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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

VINAY K. GUPTA,

Plaintiff and Appellant,

v.

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Defendant and Respondent.

E035298

(Super.Ct.No. SCV 084277)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kenneth G.
Ziebarth* and Keith D. Davis, Judges. Affirmed with directions.

Vinay K. Gupta, in pro. per., for Plaintiff and Appellant.

Law Offices of Hall & Bailey, John L. Bailey and Therese Bailey-Nelson for
Defendant and Respondent.

* (Retired Judge of the Sup. Ct. for the San Bernardino Jud. Dist. assigned by the
Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Plaintiff Vinay K. Gupta appeals an order entered on January 2, 2004, awarding defendant First American Title Insurance Company \$14,878.92 in attorney's fees and costs. Plaintiff contends the trial court erred in awarding defendant terminating sanctions, which in turn resulted in defendant recovering attorney's fees and costs. He further argues that defendant is not entitled to attorneys fees and costs under Civil Code section 1717 because defendant did not prevail on plaintiff's substantive claims. Plaintiff also challenges the trial court's ruling denying his motion for new trial. In addition, he argues the fees and costs award was premature because there was no final judgment or dismissal.

We reject plaintiff's contentions. The trial court's ruling ordering plaintiff's complaint stricken became a final appealable order, as did the court's order awarding attorney's fees and costs. This court previously dismissed plaintiff's appeal from the order terminating plaintiff's action. Therefore plaintiff's objections to that order are not properly before this court.

The only issue before this court on appeal is the order awarding defendant its attorney's fees and costs. Plaintiff did not challenge the reasonableness of the fees by filing a motion to tax costs and fees. As a consequence, the trial court did not abuse its discretion in finding defendant was the prevailing party and awarding defendant its attorney's fees and costs requested under Civil Code section 1717. The postjudgment attorney's fees and costs order is affirmed.

1. Factual and Procedural Background

In 1976, John William Veteto, Jr. and Carolyn Gail Veteto borrowed money from Walter and Dorothy Larson. The Vetetos executed an installment note, which provided that, “Should suit be commenced to collect this note or any portion thereof, such sum as the Court may deem reasonable shall be added hereto as attorney’s fees.” The note was secured by a deed of trust (trust deed), in which defendant was designated the trustee. The trust deed was recorded against the subject real property.

The trust deed contained a provision stating that if the trustor defaulted on the note, the trustee could take action to protect the security and rights of the trustee and beneficiary, “and, in exercising any such powers, pay necessary expenses, employ counsel and pay his reasonable fees.” The trust deed further stated that the trustor agreed to repay the trustee or beneficiary for these expenditures.

In October 1986, the Vetetos transferred by grant deed their interest in the subject real property to plaintiff. Dorothy Larson and plaintiff entered into a modification of the loan agreement between the Larsons and Vetetos, wherein plaintiff agreed to assume the unpaid debt on the promissory note.

In February 2001, plaintiff stopped making payments on the note and the Estate of Dorothy Larson recorded a notice of default on the promissory note. Plaintiff’s interest in the subject real property was foreclosed upon and the property was sold to Manuel Badiola.

On November 28, 2001, plaintiff filed a complaint against defendant and Manuel Badiola. Plaintiff sought to set aside the trustee's sale of his real property. After several demurrers, plaintiff filed a third amended complaint (complaint). Defendant, Badiola, and the Estate of Dorothy Larson filed cross-complaints, which they subsequently dismissed.

Meanwhile, beginning in October 2002, defendant served plaintiff with various discovery and attempted to meet and confer with plaintiff regarding deficient responses. Plaintiff refused to provide supplemental responses.

Defendant filed a motion to compel further discovery responses on May 14, 2003. On June 23, 2003, the court granted the motion, as well as monetary sanctions. The court ordered plaintiff to serve responses within 20 days.

On August 8, 2003, defendant filed a motion for terminating sanctions for plaintiff's failure to comply with the June 23, 2003, discovery order. Plaintiff opposed the motion, arguing he had adequately responded to the discovery and there was a motion for reconsideration pending on the previous discovery motion ruling. Defendant responded that plaintiff failed to provide adequate supplemental responses and had not filed a motion for reconsideration.

On September 5 and 8, 2003, plaintiff filed ex parte applications for reconsideration of the June 23, 2003, order for monetary sanctions against plaintiff. From the record it appears there was no appearance or ruling on these ex parte applications.

At the hearing on defendant's motion for terminating sanctions on September 8, 2003, the trial court granted defendant's motion and ordered stricken plaintiff's third amended complaint on the ground plaintiff continued to refuse to comply with the court's June 23, 2003, discovery order. The court executed an order striking the third amended complaint on September 23, 2003.

Defendant filed on September 29, 2003, a memorandum of costs, which included a request for attorney's fees.

On October 3, 2003, defendant filed a motion for attorney's fees and costs under Civil Code section 1717. Defendant asserted it was entitled to attorney's fees under the promissory note and trust deed, which contain provisions allowing for attorney's fees and costs.

On October 21, 2003, plaintiff filed a notice of intention to move for new trial. As a consequence, the court continued defendant's motion for attorney's fees and costs to a date after the hearing on plaintiff's motion for new trial. The court further determined that the motion for new trial would be considered a motion for reconsideration of the September 23, 2003, order striking plaintiff's complaint and would be heard on December 10, 2003, before the motion for attorney's fees and costs on December 22, 2003.

Apparently not realizing the court had already entered an order striking plaintiff's third amended complaint, on December 5, 2003, the court entered a second order

identical to the September 23, 2003, order, striking plaintiff's third amended complaint on the ground plaintiff refused to comply with the court's June 23, 2003, discovery order.

On December 10, 2003, the court heard and denied plaintiff's motion for new trial/reconsideration of the September 23, 2003, order.

Plaintiff then filed opposition to defendant's motion for attorney's fees and costs. He argued that the court could determine there was no prevailing party, and that the court could not determine the prevailing party until there was a disposition of the substantive claims raised in plaintiff's complaint.

On December 22, 2003, the trial court heard and granted defendant's motion for attorney's fees. On January 2, 2004, the court entered an order granting defendant \$14,520.50 in attorney's fees and \$358.42 in costs. The court also entered an order denying plaintiff's motion for new trial/reconsideration of the September 23, 2003, order.

Plaintiff filed a notice of appeal on February 6, 2004. The notice states plaintiff is appealing (1) the order granting terminating sanctions and striking plaintiff's complaint, entered on September 23, 2003, (2) the order denying plaintiff's motion for new trial/reconsideration, entered January 8, 2004, and (3) the order granting defendant attorney's fees and costs, entered January 2, 2004.

On March 12, 2004, this court dismissed plaintiff's appeal for failure to pay the \$655 filing fee and to file a correctly completed civil case information statement. Plaintiff requested this court to vacate the dismissal. On April 9, 2004, this court denied the request, noting that, even if this court overlooked these problems, plaintiff's appeal

from the order striking the complaint was not timely and the order denying plaintiff's motion for new trial/reconsideration is unappealable. We stated in our April 9, 2004, order that the only appealable order was the January 2, 2004, order granting attorney's fees and costs, and plaintiff had not complied with the rules on appeal.

On May 12, 2004, plaintiff filed a motion in this court to vacate the order denying dismissal of plaintiff's appeal from the order granting defendant attorney's fees and costs. This court granted plaintiff's motion to vacate the dismissal of the appeal only as to plaintiff's appeal from the order awarding defendant attorney's fees and costs, and reinstated the appeal as to the appeal from that order. We noted plaintiff's appeal remained dismissed as to the September 23, 2004, order striking the complaint and January 8, 2004, order denying plaintiff's motion for new trial/reconsideration.

On June 9, 2004, plaintiff filed a motion to modify this court's April 9, 2004, order dismissing plaintiff's appeal from the order striking plaintiff's complaint. This court denied plaintiff's June 9th motion on the ground plaintiff's appeal from the September 23, 2003, order was untimely.

On July 26, 2004, this court issued a partial remittitur in this case, stating that the September 23, 2003, order striking the complaint and January 8, 2004, order denying the motion for new trial/reconsideration have become final.

2. Discussion

Since defendant's appeal from the September 23, 2003, order striking the complaint was dismissed and the order denying his motion for new trial/reconsideration

is unappealable, the only issue to be decided in this appeal is whether the trial court abused its discretion in finding defendant was the prevailing party and awarding defendant attorney's fees and costs.

In *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, this court held that "in an appeal from a postjudgment order awarding attorney's fees, we may review the entitlement to, as well as the amount of, the fees awarded." (*Id.* at p. 1055.) But an appeal from a postjudgment order granting fees does not reopen the time for appealing from the underlying judgment. (*Id.* at p. 1053.)

In the instant case, this court dismissed plaintiff's appeal from the underlying judgment of dismissal. As a consequence, the trial court's order striking plaintiff's complaint, as a terminating sanction for plaintiff's failure to comply with the court's discovery order, is final and cannot be challenged in this appeal. This court can only consider defendant's entitlement to, as well as the amount of, the attorney's fees and costs awarded defendant. (*P R Burke Corp., supra*, 98 Cal.App.4th at p. 1055.)

Other than attorney's fees specifically provided for by statute, the measure and mode of compensation of attorneys is left to the agreement, express or implied, of the parties. (Code Civ. Proc., § 1021.) "Under Code of Civil Procedure section 1033.5, subdivision (a)(10), attorney fees, when authorized by contract, statute, or law, are recoverable as an element of costs. The Legislature has further detailed the procedure by which attorney fees as costs may be fixed: upon a noticed motion. (Code Civ. Proc., §

1033.5, subd. (c)(5); Cal. Rules of Court, rule 870.2.)” (*Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1797.)

Defendant requested attorney’s fees and costs authorized under contract. The promissory note and trust deed provide for contractual recovery of attorney’s fees and costs to the prevailing party in litigation arising out of enforcement of the trust deed and note provisions. Thus, the prevailing party in plaintiff’s lawsuit is entitled to attorney’s fees and costs under Civil Code section 1717. (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 706.)

Civil Code section 1717, subdivision (a) provides in part that “In any action on the contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney’s fees in addition to other costs. [¶] . . . [¶] Reasonable attorney’s fees shall be fixed by the court, and shall be an element of the costs of suit.”

Under Civil Code section 1717, subdivision (b), the party seeking attorney’s fees must file a noticed motion requesting attorney’s fees and must establish it is the prevailing party and the action is on the contract. Defendant complied with both these requirements. Defendant brought a motion requesting attorney’s fees as costs. When such a motion is brought, the court “shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment.

(Civ. Code, § 1717, subd. (b)(1).) Civil Code section 1717, subdivision (b)(1) defines “prevailing party on the contract” as “the party who recovered a greater relief in the action on the contract.”

Defendant established it was the prevailing party. The involuntary dismissal of plaintiff’s action resulted in defendant prevailing in plaintiff’s lawsuit. (*Elms v. Builders Disbursements, Inc.* (1991) 232 Cal.App.3d 671, 674-675; *Winick Corp. v. Safeco Insurance Co.* (1986) 187 Cal.App.3d 1502, 1507-1508.) Defendant is thus entitled to recover attorney’s fees as costs from plaintiff.

The attorney’s fee award will be disturbed on appeal only where there has been a manifest abuse of discretion. A successful plaintiff entitled to recover attorney fees as costs is entitled to all fees that are reasonable and bear a rational relationship to the substantive recovery. (*Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 654.) Since plaintiff failed to file a motion to tax attorney’s fees and costs, he waived any objection to the reasonableness of the fees and costs. Accordingly, we conclude the trial court appropriately awarded defendant its attorney’s fees and costs.

3. Disposition

The judgment is affirmed. Defendant is awarded its costs and attorney’s fees on appeal as the prevailing party. As to the amount of attorney’s fees incurred on appeal, we defer to the trial court determination of the appropriate amount of fees recoverable. Although this court possesses the power to appraise and fix attorney’s fees incurred in an

appeal, the better practice is to allow the trial court to make that factual determination, which is customarily delegated to the trial court.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/King
J.